

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the matter of	)	
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Digital Broadcast Copy Protection	)	MB Docket No. 02-230
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	)	

**Reply Comments of the  
Home Recording Rights Coalition**

**I. Introduction**

In its Comments, HRRC noted initially that all “Broadcast Flag” proposals are purportedly addressed only to “redistribution” over the Internet, in potential competition with commercial program distribution, and should neither be construed in, nor extended into, the realm of “copy protection.” HRRC said it was concerned over potential ancillary effects on consumers from technical conformance with measures necessary to implement the Flag. HRRC’s review of the Comments suggests that, while Commenters disagree on particular facts and circumstances and their implications for consumers, the HRRC observation and its concern represent consensus positions among those who have been involved in or studied the “BPDG” proceedings and report.<sup>1</sup>

Areas of concern to HRRC that involve real controversy are whether Internet redistribution of HDTV exerts any present effect on commercial program distribution; whether broadcast encryption of free terrestrial programming would be a useful, viable, or fair element of any FCC action; whether a mandate on receivers and downstream devices could or should be part of any FCC action; and the scope of the Commission’s jurisdiction to address issues and impose obligations. These areas frame the HRRC reply:

- HRRC does not believe that the Commission received any credible evidence that Internet redistribution has diminished any commercial incentive to broadcast in HDTV. Hence the FCC should not credit a threat that unless a flag is imposed, consumers will be punished by the withdrawal of present HDTV programming.
- HRRC believes that encrypting free TV broadcasts as they leave the tower would be not be fair to consumers. Nor would encryption provide any real utility in getting past difficult Flag implementation issues, or be consistent with other FCC policies and initiatives.

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<sup>1</sup> See, e.g., *Comments Of National Broadcasting Company, Inc.*, p. 4 (lawful consumer expectations for home recording in the analog world should be supported in the digital world, or the DTV transition will suffer).

- HRRC believes that arguments presented in support of FCC jurisdiction are more credible with respect to precedent pertaining to core copyright issues than they are as to authority over Flag enforcement measures applied to DTV receivers or downstream devices. Therefore, further guidance from the Congress should be obtained before a mandate can be imposed in this particular area.

II. No Persuasive Evidence Pertaining To Redistribution Of HDTV Content Has Been Presented; Threats To Withdraw Such Content Are Not Evidence And Should Not Be Credited.

In questions of cause and effect, care must be taken to avoid relying on irrelevant information or circular reasoning. Arguments presented on the subject of “harm” have introduced these factors. HRRC believes that its analysis in its Comments -- that no present evidence of disincentive to broadcast in HDTV exists, but that this does not resolve the question of future harm from redistribution -- remains the best approach.

A. Current Levels Of HDTV Programming Are Evidence Neither Of Harm Nor Of Lack Thereof.

As other Commenters point out, at present those consumers who can receive HDTV programming do not have any efficient means to upload it to the Internet; nor are the present means of HD downloading (although up to three times faster) viable either.<sup>2</sup> Consumers have at best only very modest abilities to: (1) receive programming as HDTV presentations, (2) store HDTV format programs without crowding out other storage requirements,<sup>3</sup> or (3) upload or download programs in HDTV format in hours, rather than days, per program.<sup>4</sup> The evidence presented is highly persuasive that we are far from any environment in which activity by average consumers could possibly contribute to high quality uploads over the Internet. Until and unless this factor changes, there is no other basis for rational argument about whether HDTV broadcast programming is being constrained.

Therefore, arguments about whether the present levels of HDTV programming are ample or limited, or adequately reach consumers, are secondary at best.<sup>5</sup> Until consumers are in some position to upload and download HDTV programming, there can be no rational relationship between any such practices and the amount of HDTV that is broadcast and distributed.

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<sup>2</sup> See, e.g., *Comments of Electronic Frontier Foundation*, pp. 4-5; *Comments Of The Computer & Communications Industry Association*, p. 10.

<sup>3</sup> See EFF Comments, p. 4.

<sup>4</sup> See chart in CCIA Comments, p. 10.

<sup>5</sup> See, e.g., “*Most Cable Viewers Blocked From Access To ABC HDTV Super Bowl Feed*,” National Association of Broadcasters News Release, January 27, 2003; “*Statement Of Dan Brenner, Senior Vice President, Law & Regulatory Policy, National Cable & Telecommunications Association In Response To Statement Of NAB Regarding HD Super Bowl Carriage*,” NCTA News Release, January 27, 2003.

B. The Unsupported Threat Of Viacom / CBS To Withdraw HDTV Programming Is At Best An Attempt To Manufacture Evidence Of Harm By Threatening The FCC.

Given the virtual impossibility of identifying any present harm from Internet redistribution, the threat in the Viacom / CBS (“CBS”) Comments to pull the plug on existing HDTV programs, and hence to *create* such “evidence,” deserves no weight. At best, this argument is an exercise in circular reasoning, crafting a *result* where no *cause* can be clearly identified. At worst, it may be construed as a threat directed at the Commission, instead of the evidence that was asked for.

Because HDTV programming levels cannot rationally be related to HDTV redistribution at this time, the discussion of present HDTV programming levels is neither pertinent nor persuasive, whether one views such levels as “high” or “low.” Moreover, even if there were some connection, the facts cited by CBS do not support its case. First, in discussing the number of “receivers” in consumers’ hands, CBS confuses DTV and HDTV, and “receiver” with “display.” While there are now more than four million DTV displays in consumers’ homes (and most of these indeed are HD-capable), the number of HDTV *receivers* does not exceed 640,000 -- a substantial investment by consumers, but not four million.<sup>6</sup> Second, the argument that the “windowing” distribution of motion pictures will be disturbed by lack of a Flag runs counter to the CBS threat. Before a motion picture arrives at the *free terrestrial broadcast* window, it is exposed to potential Internet distribution in earlier windows through studio security lapses, reproduction of films rented to movie theaters, camcorder copying of theatrical exhibitions, copying from DVD and VHS distribution, copying from premium cable, and copying from basic cable. Closing the last window, broadcasting, cannot be expected to do anything but increase (if it can affect at all) leakage from earlier windows.

It is difficult to imagine these circumstances all changing by the 2003 - 2004 broadcast season, on which CBS has threatened to “pull the plug.” It would be unfortunate for the recent “Plug & Play” HDTV cable solution to receive a broadcast answer of “Unplug & Don’t Play.” HRRC trusts that the network that has done so much to advance and promote HDTV programming will reconsider this unfortunate suggestion.

III. Source Encryption Of Free Terrestrial Broadcasts Would Not Avoid The Most Difficult Broadcast Flag Issues And Would Raise New Ones. It Would Punish Early Adopter Consumers And Frustrate Other FCC Objectives.

Some Commenters have proposed encrypting free DTV broadcasts upon transmission, arguing that (1) unencrypted broadcasts can be “grabbed” before reaching the home, defeating the purpose of the Flag, and (2) encryption would avoid some technical security issues in home devices.<sup>7</sup> HRRC does not believe transmission encryption to be fair, workable, or particularly useful.

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<sup>6</sup> Consumer Electronics Association, factory to dealer sales of integrated DTV receivers and separate receivers, surveys MS-108 and MS-101, through December 31, 2002. Most DTV displays sold to date will display an HDTV signal, but do not include any DTV receiving apparatus. Nor do most cable and DBS customers yet receive any HDTV signals.

<sup>7</sup> *Comments Of The IT Coalition*, pp. 18 - 19.

First, the Flag was never meant to offer 100% security; it was meant to make routine redistribution by average consumers a less than useful option. It does not, and should not be expected to, guard against specialized interception techniques, either before or after the signal is received by a conventional DTV receiver. No Broadcast Flag system, whether or not involving encryption, can operate without legally enforced compliance.

Second, imposing transmission encryption now would be unfair to consumers in several respects. While, as we note above, most purchasers of HDTV-capable displays do not own DTV receivers, a commercially significant number of such receivers, 640,000, already has been placed in commerce. These would become worthless to the early adopters who have invested in them. The Commission considers this product to be of such value that it has ordered the inclusion of an ATSC tuner in any future product containing an NTSC tuner. Aside from the effect on consumers who have already made this investment, an encryption mandate would throw the implementation schedule for the Commission's order, with which manufacturers no doubt are already taking steps to comply, into chaos.

Third, broadcast encryption would not avoid the most controversial Flag issues, and would create new controversies. Would a single, common encryption system be mandated for all U.S. broadcasters?<sup>8</sup> If so, the "Table A" controversies discussed in the Comments would pale in comparison to battles over whose system should be adopted, how it should be chosen, whether there should be optional alternatives, and if so how they would qualify.<sup>9</sup> If not, the existing "Table A" controversies would simply be ported over to the question of which encryption systems should be considered acceptable, and by whom.

Finally, no matter whether a single encryption system is chosen or several are approved, unless these systems are to be imposed as the *only* allowable systems on a home network, the "Table A" question of converting to (other) secure means of transmission or storage would persist. In fact, the only utility of transmission encryption would be in the case of devices that customarily do *not* display DTV transmissions, but have a capability to do so -- encryption would allow such devices to "ignore" the DTV signal entirely. The effects on consumers, and the uncertainty, controversy, and additional technical obstacles caused by transmission encryption are too high a price to pay to achieve this result.

IV. Precedent Cited Re FCC Jurisdiction Over Other Services And Copy Protection Is More Persuasive Than That Cited For Imposing Mandates On Broadcast Receivers And Downstream Devices. Hence, Further Guidance From The Congress Appears Necessary.

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<sup>8</sup> For example, there is a private sector standard for possible use in pay-TV broadcasts, ATSC A/70, that has never been implemented. It relies on use of removable modules and would require an official process to accept the related interface and encryption as standard. Licensing of DTV receivers, tuner cards, etc. would be necessary to assure "compliance and robustness" of the "host" receiver product. Contrary to the process envisioned by the IT comments, the terms of any such license, and the identity of the licensor, would have to be publicly decided. Alternatively, both the license terms and the compliance and robustness obligations would have to be dictated by a mandate. It is difficult to see how this would simplify the Broadcast Flag endeavor.

<sup>9</sup> Choosing a single encryption system that does not rely on replaceable modules would appear to present an extraordinarily inviting target for hackers, yet unless accompanied by complicated and controversial systems for renewal or revocation, there would be little recourse once it has been broken, as DTV receivers are expected to have long life spans in the field.

In its Comments HRRC said it would defer further discussion of the jurisdiction issue until the Comments of others could be evaluated. While the issue remains difficult, the Commission has received the benefit of substantial research.

The most comprehensive case for a finding of jurisdiction has been presented by the Motion Picture Association of America *et al* ("MPAA").<sup>10</sup> Most of MPAA's research is devoted to cases discussing the ancillary power of the FCC in particular, and of regulatory agencies in general, 'in a field of enterprise the dominant characteristic of which was the rapid pace of its unfolding,'<sup>11</sup> and where there is a need for 'discretion by the expert body which Congress has charged to carry out its legislative policy.'<sup>12</sup> The MPAA cites several cases pertaining to cable television, in which Commission jurisdiction has been upheld even where the statute is silent and congressional attempts explicitly to confer such jurisdiction have failed.<sup>13</sup> MPAA argues that jurisdiction to address issues of core concern should be considered circumscribed only where the Congress has explicitly indicated that the Commission should not act, and that this should be the rule wherever the question pertains to issues of signal security and the digital transition.<sup>14</sup>

MPAA does not succeed in tying this analysis to the imposition of compliance mandates on broadcast receivers and downstream devices. MPAA cites subparagraphs (b)(4) and (5) of 47 U.S.C. Section 336. Section 336(b), however, grants authority to the FCC to be exercised only "[i]n prescribing the regulations required by subsection (a)." Section 336(a) directs the FCC to "limit the initial eligibility" for advanced television service licenses, and to "adopt regulations that allow the holders of such licenses to offer ancillary or supplementary services." The authorization in Section 336(b)(4) for the FCC to "adopt such technical and other requirements as may be necessary or appropriate to assure the quality of the signal used to provide advanced television services" therefore refers to the quality of the DTV signal that the licensee broadcasts. The authorization in Section 336(b)(5) to "prescribe such other regulations as may be necessary for the protection of the public interest, convenience, and necessity" refers to regulations as to licensing a broadcaster for digital and ancillary services.<sup>15</sup>

Manufacturers of DTV receivers and downstream devices are not broadcast licensees; requiring consumer electronics devices to recognize and respond to a broadcast flag would not constitute regulation of DTV license eligibility, or of the quality of the signal that the DTV licensee broadcasts. Requiring a consumer electronics manufacturer to

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<sup>10</sup> *Comments of the Motion Picture Association of America, Inc., ABC, ABC Television Affiliates Association, AFMA, American Association of Advertising Agencies, American Federation of Television and Radio Artists, American Society of Composers, Authors and Publishers, Association for Maximum Service Television, Inc., Association of National Advertisers, Inc., Belo Corp., Broadcast Music, Inc., CBS, Directors Guild of America, Fox Broadcasting Company, International Alliance of Theatrical and Stage Employees, Motion Picture Technicians, Artists and Allied Crafts of the United States, Its Territories and Canada, AFL-CIO, CLC, National Association of Broadcasters, Screen Actors Guild, Inc., Writers Guild of America, East, Inc., and Writers Guild of America, West, Inc.*

<sup>11</sup> MPAA comments, p. 33, referencing *National Broadcasting Co. v. United States*, 319 U.S. 190, 219 (1943).

<sup>12</sup> *Id.*, quoting *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940).

<sup>13</sup> *Id.*, pp. 33, 35 - 38.

<sup>14</sup> *Id.*, pp. 41 - 42.

<sup>15</sup> See *Comments of Philips Electronics North America Corporation*, p. 32.

recognize and respond to a broadcast flag would not constitute regulation of the way a broadcaster provides ancillary or supplementary services. It would, instead, constitute regulation of the way a non-broadcaster responds to the *primary* video signal once transmission is complete. So paragraphs (4) and (5) of subsection 336(b) cannot be the source of FCC authority to require a consumer electronics manufacturer to recognize and respond to a broadcast flag.

The additional examples given by MPAA, of regulation of the “characteristics of television reception equipment,” do not relate to section 336, nor do they arise from any purported ancillary jurisdiction of the FCC. Rather, they are tied to direct, limited commands of the Congress that pertain to the function of the device itself -- reception of all channels, noise and sensitivity standards, closed captioning, the v-chip. Such congressional mandates may indeed support jurisdiction on a basis separate from section 336, but in the case of a broadcast signal, there is no such congressional command relating to conditional access or copyright, or to mandated response to signaling in furtherance thereof. This should be contrasted with the case, noted in HRRC’s Comments, of Multichannel Video Programming Distributors and “navigation devices,” addressed specifically by Section 304 of the Telecommunications Act of 1996. In that case, Congress passed a law addressing, with particularity, conditional access home reception devices in relation to *any* service offered by any “MVPD.”<sup>16</sup> In the absence of similar congressional direction, support for a mandate on broadcast receivers and downstream devices remains questionable at best. Before any enforcement mandate is imposed on receivers and downstream devices for broadcast signals, more specific guidance from the Congress should be obtained.<sup>17</sup>

## V. Conclusion

In its Comments, the HRRC urged the Commission to give careful attention to reasonable and customary consumer practices and expectations as it evaluates the Comments received in this Docket. HRRC said that while there is not yet persuasive evidence of harm from redistribution by ordinary consumers, there are clear indications that a broadcast flag regime could have ancillary consequences for such consumers. The Comments received in this proceeding show that these concerns are real, and that “shortcuts,” such as encrypting signals upon broadcast transmission, or withholding content until a particular solution is adopted, are not going to avoid them.

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<sup>16</sup> More specifically, “copy protection” has been addressed by the Commission as within the ambit of its regulations governing MVPD conditional access. *Further Notice of Proposed Rulemaking and Declaratory Ruling*, CS Docket No. 97-80, September 18, 2000, par. 28: “Some measure of anti-copying encryption is, we believe, consistent with the intent of the rules” limiting impositions on licensees to those that must be related, *inter alia*, to conditional access.

<sup>17</sup> *Accord, Comments of Digital Transmission Licensing Administrator, LLC* at 15 (“[T]he 5C Companies believe that the Commission would be on safer ground if Congress enacted express authority for the Commission to regulate consumer modulators. Such a grant would be appropriate, but only if it is limited to the very specific purposes set out in the NPRM and to the extent it is necessary to require compliance with the attached proposed rules. Given that it may, therefore, be appropriate to obtain from Congress such a grant of authority, in order to minimize the possibility of a successful jurisdictional challenge to the entire regime, it may well be the safest course for the Commission, at the same time, to be granted express statutory authority with respect to consumer demodulators (and downstream devices) as well.”); *Comments of Philips Electronics North America Corporation*, p. 33 (“In these circumstances, the most prudent approach—and one consistent with prior FCC regulation of consumer electronics manufacturers—would be to await a clear grant of statutory authority from Congress. A more aggressive approach would be to test uncharted waters.”)

Respectfully submitted,

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